TORT LIABILITY OF THE FEDERAL GOVERNMENT

John K. Warsaw

April, 1969

Working Paper No. 3

NGL 33-022-090

Tort Liability

NOT FOR PUBLICATION

These working papers have not been reviewed for privileged material by field counsel and thus should presently be treated as confidential and for internal use only within the N.A.S.A. organization.

George J. Alexander

Perhaps fundamental to an examination of the position of the National Aeronautics and Space Agency (hereinafter "N.A.S.A.") as a potential tortfeasor is a brief inquiry into the general history of the United States and its agencies as party defendants. Of primary importance in such situations is the doctrine of sovereign immunity, that is, the theory that the State is immune from civil suits by private party litigants.

The doctrine of sovereign immunity was clearly a part of American jurisprudence at one time: vestiges of the theory still remain. It was not possible to bring suit against the United States without governmental permission, and the introduction into congress of numerous private bills seeking such permission was a cumbersome procedure. The remedy, obviously, was to pass blanket legislation permitting suit to be brought by a specified class of plaintiffs without individual grants of permission. The Court of Claims was established in 1885 to hear complaints against the United States based on any law or contract.[1] Immunity was further waived in 1887 by the Tucker act, which granted the District courts jurisdiction concurrent with the Court of Claims in cases not exceeding $10,000.[2] The Supreme Court found the 1855 act inapplicable in cases sounding in Tort,[3] and emphatically held to this rule in a case later brought under the Tucker act.[4] Congress did grant tort jurisdiction for such situations as actions against the Government for patent infringement[5] and maritime torts,[6] and agency heads received limited authority to settle claims.[7]

This legislation did little to stem the flood of private bills introduced into Congress: In the 74th and 75th Congress, over 2,300 claims were introduced.[8] Congress did attempt to pass some sort of tort claim legislation in 1929, 1940, and 1942, but without success.[9] Finally, in 1946, Congress passed the Federal Torts Claims Act[10] (hereinafter F.T.C.A.) which purports to apply to "wrongful or negligent" conduct of any officer or agent of the United States. There are, however, some rather troublesome limitations on the act, not the least of which is the "discretionary function" clause.[11] The Supreme Court, in applying this exclusion, has held

> "... that the discretionary functions or duty ... cannot form the basis for suit under the Torts Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. *Where there is room for policy judgment and decision, there is discretion.*"[12] (emphasis supplied).

It is not unlikely that a substantial portion of the Space Agency's activities could be excluded from the act under this interpretation of the "discretionary function" limitation.

The Supreme Court may have retreated somewhat from its strict interpretation of the "discretionary function" clause. In 1957 the court permitted recovery against the United States where federal firemen permitted a forest fire to spread.[13] The steps taken (or not taken) to contain the fire were apparently a matter of discretion to some extent, but the Court seems to base its decision on want of due care in the exercise of that discretion. It should be noted, however, that the conduct of the fire fighters could well have been found negligent.

In a later case the Supreme Court held the United States liable for the death of a workman even though the trial court had not found negligence, where there was a state statute imposing a high degree of care on employers.[14] The case did not turn upon the "discretionary function" issue, but is important for another reason. If it is in fact good law it indicates that recovery may be had against the United States even where there is no showing of common-law "negligent or wrongful conduct."

It is against this historical background that the legal position taken by the space agency should be viewed. The remainder of this study will concentrate primarily on what N.A.S.A. considers that position to be, while also emphasizing the legal justification or lack thereof for such a position.

There are, perhaps, two distinct classes of incidents that a claimant might attempt to hold N.A.S.A. responsible for. The first of these is impact-type damage, where some material object actually lands on claimant's property. The second type includes non-impact injuries such as sound and vibration damage. In situations where an object actually impacts, it should be relatively simple to show who is responsible for the trespass. When the alleged cause of the damage is vibration, however, it may be somewhat more difficult to establish proximate cause, let alone legal responsibility. A claimant who is able to point to sections of a booster engine protruding from the remainder of his house has a fairly appealing case; however, one who contends that the cracks in his walls appeared as a rocket flew overhead is less likely to convince a tries of fact that N.A.S.A. ought to be held responsible for those cracks. In theory, at least, there is no distinction between responsibility for damage from rocks and debris cast upon the land of others and responsibility for damage caused by odors, noise, and vibration.[15] We

can expect, however, that those deciding the merits of a claim may overlook this bit of legal sophistication.

In the event that a private party is injured through the activities of N.A.S.A. there are several ways he might collect from the United States, regardless of the nature of the claim. It is possible, of course, that a court judgment might be obtained under the F.T.C.A. In the light of the trend of court decisions away from applying governmental immunity to discretionary function situations, the possibility of such a recovery should not be ruled out. Furthermore, it is possible to settle claims up to $25,000 without prior approval of the Attorney General if the claim meets the standards of the F.T.C.A.[16] Obviously, lack of certainty as to the availability of remedies under the Torts Claims Act will severely limit settlements under this provision. Difficulties under the F.T.C.A. can be avoided by a provision of the National Aeronautics and Space Act[17] which permits settlement of claims up to $5,000 if "meritorious." N.A.S.A. interprets this provision to mean that "a claim may be settled and paid under this authority even though the United States could not be held legally liable to the claimant."[18] This would indicate that N.A.S.A. can be expected to pay at least some claims that do not meet the requirements of the Torts Claims Act, but because of the scarcity of claims that have arisen involving impact type damage, it is impossible to state any definite rule. It does appear, though, that impact claims are the ones most likely to be paid.

In non-impact situations, such as those involving damage allegedly caused by sound and vibration, N.A.S.A. does have a fairly well defined policy: These claims are generally refused on any one of a number of grounds. It is not uncommon for the primary and perhaps only investigation of the incident to be made by N.A.S.A. engineers. As may be expected, the reports generally

suggest that the tests were conducted properly, and no damage could have occurred unless the property was already in a seriously weakened condition. It is not easy for a private claimant to refute this sort of expert testimony: there are not enough experts in the field of acoustical damage from rocket blasts to go around. Unfortunately, situations in which the reports of government engineers are the basis for rejecting a claim are not uncommon[19], and one can only speculate whether the engineer who finds that the claim is without merit is the same man who, prior to the test, predicted that no damage would occur.

N.A.S.A. officials admit that in many situations rocket vibrations could indeed have been the cause of the injury complained of. But they point out that a myriad of other factors could also have been the cause. In many cases there is no evidence other than claimant's unsupported statement, and N.A.S.A. officials consider this to be insufficient evidence on which to base a claim.[20] Where claimant says he felt the house shake and saw cracks appear during a test, N.A.S.A.'s response is that "He may be mistaken; or he may be lying."[21]

N.A.S.A. policy regarding vibration damage claims appears quite specific:

> "Property damage claims arising from N.A.S.A rocket engine tests should be denied, even though the tests have been a cause of the claimed damage, if (i) the principle cause of the damage was the extraordinary condition or nature of the property, and (ii) the claimant has no cause of action under the Federal Torts Claims Act."[22]

As noted above, the typical damage claim may be found inefficient to support a cause of action under the F.T.C.A., although plaintiff might well prevail in a common law tort action. It could easily be argued that the discretionary

settlement provisions are intended to alleviate this injustice. N.A.S.A. officials, however, take a rather conservative position on this suggestion.

A more difficult problem is presented by the above-quoted phrase "extraordinary condition or nature." A few miles from the launch area is a large bank and office building, constructed primarily of glass and aluminum sheathing. Because of the obvious vulnerability of such a structure, N.A.S.A. engineers generally monitor sound levels in the vacinity of the building during certain tests. In the event that damage were to occur, could N.A.S.A. claim that the "extraordinary condition or nature" of this building precluded recovery? Since the bank was built after the tests began, could the owners be charged with assumption of risk, and if so, what risk: flying rockets or engine vibrations? Although this subject has been the topic of informal discussion and speculation, no official, or even definite, position is apparent.

A more realistic problem centers around buildings of more conventional construction, but which are presently in such poor condition that they will eventually show "damage" in the form of cracks and strains even without the additional stress imposed by high-energy sound vibration. N.A.S.A. claims that in such situations the vibration from the test simply provided the incidental release of a pre-existing stressed condition, a release that might have come from any one of a number of other sources such as a truck in the street or someone walking in the attic. N.A.S.A. disclaims liability on the perhaps novel legal theory that one who simply triggers a pre-exising condition is not liable for the resulting injury, because the damage would have occurred sooner or later anyway, and the true "proximate cause" of the damage is the pre-stressed condition of the building.

If N.A.S.A. officials use the triggering arguement as a defense to claims, they will be treading on rather thin legal ice. The theory has merit only if the F.T.C.A. is interpreted as setting a standard of conduct for the United States and its agents, that standard being the avoidence of pure negligence. But to attribute such a function to the Act goes far beyond its original and perhaps obvious purpose, which was to waive sovereign immunity in specified types of cases. The United States clearly has duties other than simply avoiding negligence: It may not take property without compensation, may not interfere with lawful contracts, and so on. The remedies for breach of these other duties may lie in tort, but it is generally not based on a negligence theory. It is perhaps fundamental that there are wrongs other than negligence that our government ought not to commit, and it follows that the F.T.C.A. does not pretend to set a standard of conduct.

In addition to showing that his rights were invaded, claimant must also show some damage as a result of that invasion. Injuria absque damno,[24] or wrong without damage, will not support a cause of action. Although both issues must be shown by plaintiff, it is clear that the quantum of proof necessary to convince the trier of fact as to the extent of plaintiff's damage is not so great as the quantum of proof necessary to impose legal liability on defendant.[25] Much of N.A.S.A.'s argument relating to prior condition seems to be speaking to the extent of the injury, rather than the issue of liability. As a matter of practice, some uncertainty as to the exact extent of the damage is permissible, and should not be a bar to recovery.[26] The better procedure is to let the case go to the trier of fact not only to ascertain the extent of the injury[27] but also to decide the correct method to

use for such a determination.[28] N.A.S.A. claims that the correct measure of damages is the interest on the cost of repairs that would have accrued during the interval between the time repairs were actually made, and the time they would have been made but for the tests.[29] The weight of authority is contra, however, at least in cases not involving the United States, and there is no reason to suggest that this authority be rejected if a case should arise where the United States is party defendant. Even where plaintiff had already contracted for the repair of prior damage, defendant was held liable for all costs arising out of his own tort, including some repairs that might have been made even in the absence of his misconduct.[30] Plaintiff's case gains added appeal when the principle evidence of his poor prior condition is found in somewhat theoretical statements by defendants' engineers, particularly when it is not unlikely that these same engineers also made the original determination as to the safety of the test conducted. Such a witness could easily be biased in support of his earlier calculations , and hesitant to admit an error. A trier of fact is not, of course, compelled to accept without question the testimony of experts: He is in fact under a duty to exercise his own good judgment.[31] There seems to be no reason to alter the weight given expert testimony simply because the experts are also employees of the United States.

If the purpose of the N.A.S.A. legal department is to find ways for the agency to do as much as possible while still paying as few claims as possible, then counsel has done its job remarkably well. One can only question, however, who will protect the interests of a potential claimant who can not or will not go through the expense of hiring his own attorney. Many claims

are rather small, too small to warrant litigation. Moreover,when faced with legal and scientific papers that are intelligible only to those with some form of expertise, the average citizen may be quite understandably afraid to challenge the truth of what his government tells him. While intimidation of potential plaintiffs is common legal practice, it may not be the way we want our government to deal with its citizens.

1 Original at PL 33-122, 10 Stat. 612 (1855). Now codified as 28 U.S.C. 791, 1346, 1402, 1491-1494, 1503, 2071, 2072, 2411, 2412, 2506, 2509-2511.

2 Original at PL 49-359, 24 Stat. 505 (1887).

3 Gibbons V. U.S., 75 U.S. 453 (8 Wall. 269) (1868).

4 Schillenger V. U. S., 155 U.S. 163(1894).

5 28 U.S.C. 1498.

6 PL 66-156, 41 Stat. 525, 46 U.S.C. 742 (1920), PL 68-546,43 Stat. 1112, 46 U.S.C. 781 (1925).

7 PL 67-375, 42 Stat. 1066 (1922). See generally: Holtzoff; *Hearings Before the Senate Committee on the Judiciary on H R 7236,* 76 Cong., 3rd Sess (1940) p 32.

8 Sen. Rep. 1400, 79 Cong., 2nd Sess. (1946) p 30. For a breakdown of the bills introduced into the 70th Congress, see *Hearings Before the House committee on the Judiciary on H R 7236,* 76 Cong., 3rd Sess. (1940) p 32.

9 *The Federal Torts Claims Act,* 76 Yale L. Rev. 534 (1947). See also: *Report of the Joint Committee on the Organization of Congress to Accompany S 2177,* Sen. Rep. 1400, 79 Cong., 2nd Sess (1946) p 30.

10 Codified as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671 - 2680.

11 28 U.S.C. 2680(a) as amended.

12 Dalehite v. U.S., 346 U.S. 15 (1953).

13 Rayonier v. U.S., 352 U.S. 315 (1957).

14 Hess v. U.S., 361 U.S. 314 (1960).

15 Coulton v. Onderdonk, 10 P 395, 69 Cal. 155 (1886); Morse v. Hendry Corp., 200 S.2d 816 (Fla. 1967).

16 28 C.F.R. sub 14.1 - 14.11.

17 PL 85-568, 72 Stat. 429, 42 U.S.C. 2473(B)(13)(a).

18 NM 1# 2082.3 §2(b), reprinted at 32 C.F.R. 13321-13323.

19 Richard N. Wolf: *Claim of Mrs. Bristow Wing - Evaluation by the Chief Counsel, Marshall Space Flight Center,* 3 March 1964; Stephen J. Gross: *Claim of Earl Shaw,* 17 Jan. 1968. (Both available from NASA files in Washington and as issued to field offices.)

20 NASA Headquarters Memo for General Counsel: *Claims for Property Damage Stemming from Rocket Engine Tests,* Draft G/SJG, 11-8-67.

21 *Id.* at p 4.

22 *Id.* at p 7.

23 *Ibid.*

24 City of Janesville et al v. Carpenter, 46 N.W. 128 (1890).

25 Wash.State Bowling Prop. Assoc. V. Pacific Lanes, Inc., 356 F.2d 371 (1966); Story Parchment Paper Co. V. Patterson Parchment Paper Co., 282, U.S. 555 (1930).

26 Anderson V. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

27 Groves V. Gray, 59 N.E.2d 166 (1942).

28 U.S. V. Sutro, 235 F.2d 499 (1956).

29 *Claim of Earl Shaw,* supra note 19.

30 Atlantic Refining Co. v. Matson Navigation Co., 253 F.2d 777 (1958);
31 Isthmaian SS Co. v. McElligott, 177 F.2d 591 (1949); Atlantic Baggage & Cal Co., v. Mizo, 61 S.E. 844 (1908).